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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re GOOGLE DIGITAL PUBLISHER ANTITRUST LITIGATION	No. 5:20-cv-08984-BLF **PUBLISHER PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS CONSOLIDATED CLASS ACTION COMPLAINT** Date: October 14, 2021 Time: 9:00 a.m. Courtroom: 3, 5th Floor, San Jose Judge: Hon. Beth Labson Freeman

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INTRODUCTION

Plaintiffs are internet publishers ("Publishers") that sell ad space on their websites using tools that they purchase from Google. Plaintiffs allege that Google engaged in a series of mutually reinforcing anticompetitive acts in adjoining markets to acquire and maintain monopoly power over the markets for these tools, artificially inflating Google's charges to Publishers and suppressing the prices Publishers receive for their ad space. Plaintiffs allege that Google's conduct constitutes actual and/or attempted illicit monopoly acquisition and maintenance under Section 2 of the Sherman Act and violates California's Unfair Competition Law.

In its motion to dismiss ("Motion" or "Mot."), Google portrays itself as a beneficent facilitator of the web advertising technology marketplace, claiming that it graciously undertakes "to ensure that advertisers do not pay too much while publishers do not receive too little." Mot. 2. But that is the problem. Google exploits its position as both the dominant overseer *and* the dominant participant in web ad auctions and related processes for its own gain at the expense of competition and other participants. Google operates auctions that Publishers use to sell their ad space and advertisers use to place ads on the open web, and also places bids on behalf of advertisers. In these auctions, Google sets the rules by which all participants, including itself, compete. Unsurprisingly, Google rigs the game in its favor. Google has cemented its omniscient gatekeeping role—overseeing all competition for the tools Publishers use to sell ads on their websites—through a series of exclusionary acts, anchored by illegal ties.

Plaintiffs' Consolidated Class Action Complaint ("Complaint" or "CC") alleges three relevant markets: Ad Server, Ad Exchange, and Ad Network. Ad Servers are the means by which Publishers display ads on their websites, sourcing ad placements in real-time from advertisers ("Advertisers") who purchase Publishers' web ad space through ad auctions. Ad Exchanges (for large Publishers) and Ad Networks (for smaller Publishers) (collectively, "Ad Intermediaries") match Publishers with Advertisers seeking to purchase ad space based on web page content, the specific viewer, and information about that viewer's interests. Publishers' sale of web ad space in this fashion is called "programmatic ad sales." Plaintiffs allege that Google has "over 80%" of the Ad Server market and in excess of 50-60% of the Ad Intermediary markets. CC ¶¶133, 73.

The Complaint alleges a series of mutually reinforcing anticompetitive ties, designed to drive market share to Google's Ad Intermediaries while also reinforcing its Ad Server monopoly. Google initially used its monopoly power to require its market-dominant pool of Advertisers to use only Google's Ad Intermediaries. Google then conditioned Publishers' access to its must-have pool of Advertiser demand through its Ad Intermediaries (tying products) on using Google's Ad Server (the tied product). Google then ran the tie the other way: (1) requiring smaller Publishers using its dominant Ad Server product (tying product) to use Google's Ad Network (tied product) exclusively, and (2) integrating its more complex Ad Server for larger Publishers (tying product) and its Ad Exchange (tied product) into a single marketed product, Ad Manager, effectively forcing Publishers using its Ad Server to allow Google's Ad Exchange to bid on ad space in auctions Google's Ad Server rigs in its favor.

Google's control over Publisher Ad Servers—bolstered through these ties—has given Google the power to exploit this illicitly-cemented gatekeeping position to rig the rules in its favor for the sale of the vast majority of all ad space on the open web. Google has done so by giving itself a last look, imposing a tax on customers that deal with Google's Ad Intermediary rivals, and blocking alternatives to Google's auctions, preventing Publishers from leveling the playing field.

Google seeks dismissal claiming that Plaintiffs have pleaded the Ad Intermediary markets too narrowly (Mot. 3-5); that its share of the Ad Intermediary markets is insufficient to show monopoly power (Mot. 8); that Google did not engage in exclusionary conduct, but merely refused to help rivals compete (Mot. 9-16); and that Plaintiffs have not sufficiently pled a violation of California's Unfair Competition Law (Mot. 17). These arguments have no merit.

As to market definition, Google contends that social networking and shopping sites must be included in the Ad Intermediary markets because these "walled gardens" purportedly constrain Google's pricing. Mot. 2, 4. But antitrust relevant markets are defined by the full set of products that are considered functionally and reasonably interchangeable *by their consumers*. Here, Publishers are the relevant consumers. Publishers use Google's Ad Intermediary tools to sell ad space on *their* websites. While Facebook and Amazon also sell ad space on their own sites, they do not provide services that enable Publishers to sell ad space on Publishers' websites. Similarly,

certain large Publishers sell a portion of their ad space directly to Advertisers on terms negotiated by employees (“Direct Deals”). The Complaint explains, however, that the high costs and low availability of Direct Deals means they cannot meaningfully constrain an Ad Exchange or Ad Network monopolist, and that even those Publishers who engage in Direct Deals need to use Ad Intermediaries for most of their ad sales. Thus, Direct Deals are likewise not reasonable substitutes for Google’s Publisher tools to sell programmatic ads. *See* Part I.C, below.

Publishers amply allege bases for Google’s market power in the relevant markets, including: high barriers to entry, CC ¶¶173-75, fragmented rivals with low market shares, CC ¶¶71, 72, and that Google’s market shares “exceed 50-60%” in these intermediary tool markets, CC ¶73, which is higher than the 50% this Court has previously held to be sufficient in *Arista Networks, Inc. v. Cisco Sys. Inc.*, No. 16-CV-923-BLF, 2018 WL 11230167, at *18 (N.D. Cal. May 21, 2018) (“*Arista*”). Recognizing the intensely factual nature of the inquiry, the Complaint does not expressly characterize Ad Intermediaries as two-sided transactional platforms under *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) (“*Amex*”). However, *Amex* imposes no such pleading requirement, and in any event, the Complaint alleges that Google artificially inflates rates both to Publishers *and* Advertisers, thereby pleading injury to both, which is all that is required even if the markets here are later determined to be two-sided. *See* Part I.E, below.

Google’s argument that Plaintiffs have failed to plead exclusionary conduct improperly reframes Plaintiffs’ allegations as a simple refusal to deal in which Google merely employed power stemming from its technological ingenuity to favor its own products on its own platform. Mot. 2. But Plaintiffs instead allege that Google engaged in a series of interconnected acts—anchored by illegal two-way ties—that put Google in position to control rivals. Google then leveraged that gatekeeping power to eliminate competition, undermine rivals, and punish customers, all while degrading the value of its products to customers. Longstanding antitrust precedent, including *Arista* in this Court, bars abuse of power acquired or cemented through coercion or deceit to undermine rivals. Google’s cited authorities involve inapposite allegations about firms that had both lawfully acquired and legally maintained their monopoly status, and merely chose not to help rivals. Here, Google did not merely refuse to help rivals—it actively used

its illicitly-entrenched gatekeeping power to interfere with the competitive process, to harm rivals' customers, and to stack the deck in its favor—conduct which courts have repeatedly found to be unlawfully exclusionary. *See* Part II.B, below.

LEGAL STANDARD

Under Rule 12(b)(6), the Court "must accept as true all of the factual allegations contained in the complaint," *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1 (2002), and "must draw all reasonable inferences" from those allegations in the plaintiff's favor, *Hines v. Youseff*, 914 F.3d 1218, 1227 (9th Cir. 2019). The Court "may not consider material outside the pleadings" unless those matters have been incorporated into the complaint by reference or are properly subject to judicial notice. *Khoja v. Orexigen Therapeutics, Inc*., 899 F.3d 988, 998 (9th Cir. 2018); *see* Fed. R. Civ. P. 12(d).

ARGUMENT

I. Publisher Plaintiffs Adequately Plead Relevant Product Markets

As summarized above, this case involves Ad Servers, Ad Exchanges, and Ad Networks. *E.g.*, CC ¶¶5-10, 158. The latter two—the Ad Intermediaries that match Advertisers with Publishers through programmatic ad auctions—serve distinct groups of Publishers and comprise distinct relevant markets. *Id.*; *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962). Google argues that these Ad Intermediary markets are ill-defined because they do not include tools for selling ad space sold on social media or shopping sites, such as Facebook.com and Amazon.com—websites operating vertically-integrated platforms that sell their own ad space on their own platforms. Mot. 3. But the relevant markets here are defined based on the tools Publishers purchase to sell Publishers' ad space. The walled gardens are not part of the relevant markets here because the walled gardens do not sell tools that *Publishers* could purchase to sell the *Publishers'* ad space. CC ¶169. And Publishers do not and cannot sell advertising inventory space on "walled garden" websites, because Publishers do not own any advertising inventory space on sites like Facebook—Facebook owns it. *See id.* Google's contention that the Publishers could sell their ad space directly to Advertisers, seeking to include these "Direct Sales" in the relevant market, Mot. 5, is similarly erroneous. Such sales entail substantially higher costs, and even Publishers whose staffs negotiate

direct-sold ads still need Ad Intermediaries to sell the inevitable portion of ad space that direct-sold ads cannot fulfill. CC ¶53.

A. Applicable Legal Standards for Defining Relevant Markets

Plaintiffs pled their antitrust product markets based on the applicable standards, defining boundaries by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. Reasonable interchangeability requires a "factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Tech. Svcs., Inc.*, 504 U.S. 451, 482 (1992) ("*Kodak I*"). Cross-elasticity of demand refers to "whether consumers view the products as substitutes for each other." *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1435-37 (9th Cir. 1995); *Sumotext Corp. v. Zoove, Inc.*, 2020 WL 533006, *11 (N.D. Cal. 2020). Courts evaluate cross-elasticity by the "hypothetical monopolist" test, which asks whether a complete monopolist—"the only present and future seller" of products in the alleged market—could profitably impose a "small but significant and non-transitory increase in price" ("SSNIP"). DOJ & F.T.C., Horizontal Merger Guidelines § 1.11 (2017); *Sumotext*, 2020 WL 533006 at *11 (citing *Theme Promotions, Inc. v. News Am. Mktg.*, 546 F.3d 991, 1002 (9th Cir. 2008)).

Neither the reasonable interchangeability nor the cross-elasticity inquiry offers a bright-line rule for pleading purposes. "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range." *Twin City Sportservice, Inc. v. Charles O. Finley & Co, Inc.*, 512 F.2d 1264, 1271 (9th Cir. 1975). Instead, a "circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 613, 73 S. Ct. 872, 883, 97 L. Ed. 1277 (1953). Accordingly, market definition in sophisticated industries routinely demands economic testimony and fact presentations to elucidate how the industry works, and is not susceptible to resolution on a motion to dismiss. *See, e.g., Newcal Industries v. Ikon Ofc. Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008); *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1203 (9th Cir. 1997).

B. Walled Gardens Are Not Substitutes For Tools to Sell Publishers' Own Ad Space

Market definition must take the perspective of customers. *Kodak I*, 504 U.S. at 482. This case focuses on antitrust injuries incurred *by Publishers* when they use Google's Ad Server and Ad Intermediaries to sell ad space located on their own sites. The Publishers' perspective must therefore control—and the Complaint pleads from that perspective. The Complaint alleges facts fitting many of *Brown Shoe*'s classic "practical indicia," 370 U.S. at 325, including: the markets include distinct tools that have "peculiar characteristics and uses," *id*., namely, that Publishers use these tools to participate in the auction process necessary to sell their programmatic ad space, CC ¶169; the markets exclude "distinct customers," 370 U.S. at 325—namely, the massive, vertically-integrated social media and shopping sites, such as Facebook and Amazon, that use their own tools that are not available to Publishers, CC ¶¶163-69, *cf*. Mot 3 ("advertisements placed on Facebook and Amazon reach only visitors *to those websites*") (emphasis added); and, there is "industry or public recognition," 370 U.S. at 325, of this distinction between "walled gardens" and "open display advertising," based in part on the industry's use of these terms to distinguish the two, CC ¶169.

Google attempts to cloud the simple reality that Facebook and Amazon do not sell tools that Publishers can use to sell their ad space by postulating a "downstream competition" theory, asserting that Advertisers' ability to choose alternatives to Publishers' ad space constrains Google's power over Ad Intermediaries. Mot. 4. In Google's telling, Advertisers are relevant market participants that react to price changes that Google imposes on Publishers. Specifically, Google asserts that if it were to raise prices to Publishers above competitive levels, Publishers would pass those price increases on to Advertisers in the form of higher ad prices, which would in turn cause Advertisers to flee from open display advertising. *Id.* 4.

Aside from being intensely fact-based, this "downstream competition" theory is fundamentally flawed because it looks at the wrong product, the wrong customers, and the wrong price increase. This is the *Publisher* case, not the *Advertiser* case, and Google needs to address *Publishers'* options, not those of Advertisers. *Kodak I*, 504 U.S. at 482. Any hypothetical price

increase must occur in the relevant markets—the price for the services of Ad Intermediaries—where the alleged unlawful conduct takes place. *Sumotext*, 2020 WL 533006, at *11 (SSNIP tests are performed on "a product in the proposed market"). A proper downstream competition analysis—if even tenable at this stage—would need to address what Publishers, not Advertisers, would do in the face of an increase in the price of services sold by Ad Intermediaries. Faced with a SSNIP for Ad Exchange or Ad Network services, no Publisher can respond by utilizing Facebook or Amazon because neither provides services to sell the Publishers' ad space.

Further, Google's downstream theory contradicts the factual allegations of the Complaint, which at this stage must be accepted as true. Google's theory posits that a Google price increase *to Publishers* would increase ad prices *to Advertisers,* thereby causing Advertisers to switch to walled gardens. However, Plaintiffs expressly allege that Google has charged artificially inflated prices to Publishers and Publishers *have not passed those increases on to Advertisers*. *See* CC ¶¶201-205 (alleging that Google's conduct has reduced the amount Publishers receive for selling ad space). Even if Google's downstream theory were legally appropriate, it is at best premature.

Google's reliance on *California v. Sutter Health System*, 84 F. Supp. 2d 1057, 1067 (N.D. Cal. 2000), Mot. 4, is also misplaced. *Sutter* is a preliminary injunction order, issued after evidence and fact findings arising out of California's challenge of a proposed hospital merger. The State argued that Kaiser hospitals should not be considered "hospitals" for product market definition, because Kaiser provides services only to its own "captive" insurance customers. *Id.* at 1062, 1067-68. But a hospital is a hospital, whether its patients pay as part of an insurance contract or on a per-visit basis. *See id.* at 1067-68. Unlike hospital patients who can receive treatment at any hospital, Publishers have *no capacity* to sell their Publisher ad space through social media or shopping sites. Moreover, Google's quote from the Horizontal Merger Guidelines (Mot. 4) omits relevant context as the "influence of downstream competition" is the *last* in a long list of factors that "the Agencies take into account" when evaluating mergers. *Id.;* Guidelines, §4.1.3. The Guidelines also warn that the Agencies do *not* "evaluate the competitive effects of competing buyers strictly, or even primarily, on the basis of effects in the downstream markets." Merger Guidelines, §12. Even if "downstream competition" presented a market definition issue, it

would be a complex fact issue, not one for resolution on a motion to dismiss.

C. Direct Deals Are Not in the Relevant Markets

The Complaint explains that "Some large publishers with significant staffing and strong demand for their inventory are able to sell a limited number of advertisements directly to advertisers." CC ¶53. These Direct Deals are high cost, requiring "publishers to invest substantially in managing, selling, and serving online ad campaigns." *Id.* ¶165; *cf. Brown Shoe*, 370 U.S. at 325 (unique product facilities indicate separate products). These features mean that Direct Deals are only viable for a few high-value sales. *Id.*; *cf. Brown Shoe*, 370 U.S. at 325 ("distinct prices" indicate separate products). In all, Direct Deals can offer only unpredictable volume that is far from sufficient to run a website. *See id.* ¶¶53, 165; *cf. Brown Shoe*, 370 U.S. at 325 (unique characteristics indicate separate products). Even Publishers who engage in Direct Deals utilize programmatic channels to distribute remnant inventory. *Id.* As a result, Direct Deals will not prevent a hypothetical monopolist from imposing a SSNIP, are not reasonably interchangeable with the programmatic sales at issue, and therefore are not part of the relevant markets. *See id.* ¶¶164-65.

The mere fact that direct and programmatic sales tools are both means of selling the same product (ad space) does not mean that the two sales channels belong in the same relevant market. There is ample precedent for this basic proposition. *See, e.g.*, *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1080 (D.D.C. 1997) (SSNIP establishes that sale of office supplies through superstores is an appropriate relevant product market for purpose of evaluating proposed Staples and Office Depot merger even though same products were also sold through other channels); *Thompson v. 1-800 Contacts, Inc*., 2018 WL 2271024, at *9 (D. Utah 2018) (relevant product market is online retail market for contact lenses even though same products also sold through other channels).

Google argues that among the Publishers are buyers so large and powerful that they will constrain Ad Network and Ad Exchange prices—as a matter of law. Mot. 5. Google is again wrong on the facts. The Complaint alleges that even large Publishers must use Ad Intermediaries for some of their inventory and cannot substitute to Direct Deals entirely. *See, e.g.*, CC ¶¶165-166. Google is also wrong on the law: "buyer power . . . alone cannot rebut" an antitrust claim. *F.T.C.*

v. Cardinal Health, 12 F. Supp. 2d 34, 61 (D.D.C. 1998). Power-buyer defenses are especially weak where, as here, a market lacks transparent pricing. *Compare Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 439-440 (5th Cir. 2008) (rejecting a power-buyer defense where relevant market used confidential bids, leaving the buyers with "imperfect information" with which to negotiate lower prices), *with* CC ¶56 (opaque pricing), CC ¶¶145-56 (Google benefits from information asymmetries) *and* CC ¶¶153-57 (Google actively works to degrade bid information to Publishers and Advertisers).

D. The Complaint Does Not Allege That YouTube Is in Any Relevant Market

Google reads into the Complaint allegations about YouTube. Mot. 3. The Motion cites paragraphs that have nothing to do with YouTube or video advertising. Mot. 4 ("*See, e.g., id.* ¶¶72, 165"). And Google's citation-free assertion that YouTube now sells its product under the "Google Display Network" does not make YouTube part of any relevant market. Mot. 3-4.

E. *Amex* Does Not Create Any Special Pleading Burden—and Publishers Allege All the Facts Needed for an *Amex*-Style Analysis

Google argues that *Amex* creates a special pleading rule about market definition; namely, that two-sidedness must be both expressly pled and also decided on the pleadings. Mot. 6-7 (citing a post-trial opinion, *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43 (2d Cir. 2019)). That is not the law. *Amex* does not invent a new pleading requirement. To the contrary, *Amex* reasons that antitrust market definition abhors "formalistic distinctions," and the *Amex* review of the trial record undermines the notion that *Amex* encourages—let alone demands—new pleading burdens. 138 S. Ct. at 2285, 2287-90.

The Court need not wade into the thicket of deciding whether the Ad Intermediary markets are two-sided in the *Amex* sense now because, contrary to Google's assertion that the Complaint has "*nothing at all*" to say about "the implications" of a two-sided market, Mot. 6, the Complaint addresses the key *Amex* considerations for a market that may be deemed two-sided. In particular, *Amex* requires courts to consider the competitive effects (price and non-price alike) on both sides of a two-sided market. 138 S Ct. at 2287-90. Out of an abundance of caution, the Complaint alleges just that. For instance, Plaintiffs allege that Google's conduct enables it to take more

money from *both* Publishers and Advertisers. CC ¶55; *see also id.* ¶211 (Google's conduct has raised the "net prices" of its services by exploiting network effects). Publishers allege that Google's conduct has also caused non-price harms to both groups by degrading service quality, manipulating auctions, and coercing Advertisers to use Google's services over those of rivals. CC ¶¶95-96, 102.

In any event, Google mischaracterizes *Amex*. The *Amex* plaintiffs insisted on trying their case solely on the "merchant side" of the credit card market, presenting insignificant evidence of the challenged provisions' effects on cardholders. 138 S. Ct. at 2304. The plaintiffs' failure to consider the effect on cardholders—the other side of the two-sided market there—required a verdict in Amex's favor. *Id.* at 2287-90. The Court's legal holding is expressly limited, however. The threshold issue of two-sidedness requires complex fact finding about how the markets behave, including their price structures, that is inappropriate on a motion to dismiss. *Id.* at 2286. Should the Court choose to address *Amex* issues now, Plaintiffs have shown harm on "both sides." But the market in this case is too complex to be resolved on the pleadings, so any ultimate *Amex* determination should be deferred.

F. Google Cannot Use Market Shares to Escape Antitrust Scrutiny

Power in antitrust markets should not degenerate into "a numbers game" of market shares. *Rebel Oil*, 51 F.3d at 1438 n.10. The "wiser" approach is a careful analysis of both shares and other market facts. *Id.* Ad Intermediaries need to be able to offer a deep pool of ads ready to serve to internet users in an instant. *E.g.*, CC ¶¶15-16, 130-3. Only Google and a handful of other vendors could possibly supply such ad volume due to Google's market-dominant pool of Advertisers. *See, e.g.*, CC ¶¶183-84. And because a bigger collection of Advertisers attracts a bigger collection of Publishers, Google's Ad Intermediaries exhibit network effects—a feedback loop that strengthens Google's power over Publishers as it adds Advertisers, and *vice-versa*. CC ¶¶74-76, 82, 102, 123. That feedback loop, combined with other high barriers to entry and Google's misuse of its Ad Server monopoly, entrenches Google's Ad Intermediaries, and enhances Google's control in all the relevant markets. CC ¶¶74-76, 126, 132-35, 157, 173, 178. Firms as large as AT&T and Yahoo! tried to offer substitutes for the Ad Intermediaries that

Google dominates, but either withdrew or had very limited success. CC ¶¶74-79, 183-84, 211.

Yet Google argues that its market share in excess of 50-60% of the Ad Intermediary markets (CC ¶73) means Google cannot exercise monopoly or attempted monopoly power as a matter of law. Mot 8. This Court recently rejected that argument: "Although the Ninth Circuit recognized that some 'courts have considered a 50% share of the market as inadequate to establish a proscribed monopoly,' it did not preclude such a finding." *Arista*, 2018 WL 11230167, at *18 (quoting *Twin City*, 512 F.2d at 1274). *Arista* was a summary judgment opinion following extensive discovery, where the Court had the benefit of a full factual record. In light of that record, the Court held that "at least 50% market share" raised a triable question of market power. *Id.*; *see also Pac. Steel Grp. v. Commercial Metals Co.*, 2021 U.S. Dist. LEXIS 97113, at *18 (N.D. Cal. May 21, 2021) (collecting circuit court decisions). While Google now declares that in excess of 50%-60% is "clearly" insufficient, Mot. 8, Google's lead counsel here represented the *Arista* plaintiff, *see* 2018 WL 11230167, at *1, and argued successfully the exact opposite: that "monopoly power can be found even with 50% or greater market share." Arista Opposition to Cisco's Motion for Summary Judgment, ECF No. 240, 16 Civ. 00923-BLF at 15, 2018 WL 2369182; *see also* Arista Motion for Partial Summary Judgment, ECF No. 213, No. 16 Civ. 00923-BLF at 5, 9-10, 2018 WL 1747452. That argument has even more force at the motion to dismiss stage where market share factual issues are rarely resolved. *Newcal*, 513 F.3d at 1052.

Market share analysis at the pleading stage must also consider shares in conjunction with other allegations that plausibly create market power. The network effects that market participants obtain in technology markets can create power beyond what a bare market share suggests. Judge Patel so held in an opinion where she cited the network effects in the *Microsoft* case as a factor that created more market power than a casual share analysis would suggest. *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119 (N.D. Cal. 2010) (quoting and citing *U.S. v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001)). The Complaint makes the same network effects points (*id.* at ¶¶74-82, 102 & 123) and cites *Microsoft* on that score. CC ¶135; *see also id.* ¶¶127, 224 (articulating how Google and its conduct exploits marketplace dynamics similar to those in *Microsoft*). Finally, as to the attempted monopoly claim, it requires only a "dangerous probability"

that the defendant's misconduct will succeed in obtaining, maintaining, or expanding monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 US 447, 453-54 (1993). In "most" attempt cases, courts use 30% share as the threshold. *Rebel Oil*, 51 F.3d at 1438.

II. Plaintiffs Sufficiently Allege Unlawful Exclusionary Conduct

Through a series of anticompetitive bilateral ties between its Ad Server and Ad Intermediary products, Google solidified itself as gatekeeper in all three relevant markets—effectively acting as the overseer and tollbooth operator for all competition in these markets. Google then abused its monopoly power and gatekeeping position by imposing rules and engaging in predatory practices that further impaired and excluded competition. In short, Google: (1) illegally tied its dominant Ad Servers, on one hand, and Ad Exchange and Ad Network products, on the other, and *vice versa*, CC ¶¶11, 15-16, 64, 124-34; (2) punished Publisher-customers and coerced exclusivity by requiring Publishers, as a condition of using Google's dominant Ad Servers, to give Google exclusive control over the Publishers' own user data, CC ¶¶153-55; and, (3) used its power bolstered through the illegal ties and other exclusionary conduct to undermine alternatives to its auctions, and then, once its auctions became the only game in town, imposed rules and fee structures to rig them against rivals. CC ¶¶89-122.

Google's course of exclusionary conduct revolves around anticompetitive bilateral ties between its Ad Server and Ad Intermediary products. Google first exercised its dominance in tools Advertisers use to purchase Publishers' ad space to drive volume and increase its power in the Ad Intermediary Markets. *See, e.g.*, CC ¶¶11, 124-134. It then forced Publishers seeking access to Google's Advertisers in the Ad Intermediary markets to use Google's Ad Servers. *See* CC ¶¶11, 64. Google also reversed the ties, requiring Publishers selecting Google's Ad Servers to use Google's Ad Intermediaries. CC ¶¶15, 62, 131-34. Google's ties are self-reinforcing due to "network effects": As Google's Ad Server controls the advertising decision-making of more Publishers, it becomes more important for Advertisers to use Google's services lest they lose the auctions Google uses its Ad Servers to rig in favor of Advertisers who use Google's ad buying tools. CC ¶¶10, 64, 75-76. By gathering up those Advertisers, Google made itself even more indispensable to Publishers, becoming like a snowball rolling down hill, gathering strength as it

went. *E.g.*, CC ¶¶74-76, 82, 102, 139. As a result, Google unlawfully cemented monopoly power in all three relevant product markets. *Id.*; *see also id.* ¶189.

Importantly, the tying secured and entrenched Google's place as *the gatekeeper* for open display advertising. Google has used its position to punish rival Ad Intermediaries and their Advertiser customers. More specifically, Google rigged auctions so that Google's Advertisers would "win"—even where Advertisers bidding through rival Intermediaries offered higher bids. As a result, Google excluded and impaired Ad Intermediary rivals even where those rivals offered Publishers and Advertisers lower prices, better service, or both. The Ninth Circuit condemns the use of monopoly power that "impair[s] the opportunities of rivals" in a way that does not "further competition on the merits." *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008); *see also Free FreeHand Corp. v. Adobe Systems Inc.*, 852 F.Supp.2d 1171, 1180 (N.D. Cal. 2012) (same). Each of Google's acts is unlawfully exclusionary, but Google's course of conduct also produces synergistic unlawful exclusionary effects and is appropriately evaluated collectively. *Tele Atlas N.V. v. NAVTEQ Corp.*, 2008 WL 4809441 (N.D. Cal. Oct. 28, 2008).

A. Google Used Illegal Ties to Cement Its Gatekeeper Role

Google's course of conduct centers on tying, which is a classic form of exclusionary conduct made unlawful under Section 2. *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 435 (7th Cir. 2020), *cert. denied*, 2021 WL 2637989 (U.S. June 28, 2021) (tying claim deemed exclusionary under Section 2); *Microsoft*, 253 F.3d at 96-97 (same). The Complaint alleges a series of ties that bolstered Google's gatekeeping position, which Google then used to impose additional, mutually reinforcing, anticompetitive restraints. Plaintiffs' allegations satisfy all three elements of a tying claim: (1) a tie between two distinct products or services; (2) sufficient economic power in the tying product market to coerce customers into purchasing the tied product; and (3) an effect on a not-insubstantial volume of commerce in the tied product market. *PeaceHealth*, 515 F.3d at 912. The third requirement alternatively requires a showing of "a significant negative impact on competition in the tied product market." *Packaging Sys., Inc. v. PRC-Desoto Int'l, Inc.*, 2018 WL 735978, at *6 (C.D. Cal. Feb. 6, 2018).

Google challenges the first element, asserting that Plaintiffs "do not allege that the products are unavailable separately[.]" Mot. 13. Google is wrong. The Complaint specifically alleges that Google requires that Publishers' access to Google's must-have pool of Advertisers in the Ad Intermediary markets is conditioned on their use of Google's Ad Servers. *See* CC ¶11 ("Google restricted access to its Ad Network and Ad Exchange products to publishers using Google's Ad Server"); CC ¶64 ("Google restricts access to its advertising pool [in the Ad Intermediary Markets] only to those using Google's publisher Ad Server"); *see also id.* ¶¶15, 126. Google itself effectively concedes this tie, arguing that "To reach the advertisers that have chosen to bid through Google, Publishers must of course use Google's services." Mot. 14.

Further, Publishers selecting Google's market dominant Ad Server for small publishers (AdSense) must sell ads exclusively through Google's Ad Network. CC ¶¶62, 131-34. And larger Publishers using Google's Ad Manager "are locked into using Google's Ad Exchange." *Id.* ¶15. In other words, a Publisher can only reach Advertisers bidding through Google's Ad Intermediaries by using Google's Ad Servers. Accordingly, in contrast with the cases Google cites, Mot. 14, Publishers were not free to buy each product separately. *It's My Party, Inc. v. Live Nation, Inc.*, 811 F. 3d 676, 685-86 (4th Cir. 2016) (no evidence that buyers were forced to by tied product with tying); *Apple iPod iTunes Antitrust Litig.*, 2009 WL 10678940, *5-6 (N.D. Cal. Oct. 30, 2009) (same).

Plaintiffs also plead facts supporting the existence of economic power in the tying product markets to create a factual dispute inappropriate for resolution on a motion to dismiss. Google has 70-90% of the Ad Server market. CC ¶¶70, 171, 173. Where the Ad Intermediaries are tying products, Google has in excess of 50-60%. *Id*. ¶73. Google's power is strong and durable because all three markets have high barriers to entry and expansion. CC ¶¶73, 173-75; *see also* Part I.F, above. That is enough. *See Arista*, 2018 WL 11230167, at *18; *Collegenet, Inc. v. The Common Application, Inc.*, 355 F. Supp. 3d 926, 959 (D. Ore. 2018). Google controls terms applicable to no less than 70% (and likely far more) of Ad Intermediary Markets through its dominant Ad Servers (*see* CC ¶10; *id*. ¶¶88-122)). *See Image Tech* 125 F.3d at 1207 (30% market share in tying product suffices where defendant also had power to set the terms of sale for another 30-35% of market

sales).

Plaintiffs also show tying market power by alleging that Google has a "unique" product. Because Google has such a large pool of Advertisers bidding through its Ad Intermediaries, "publishers have no choice but to use Google's publisher Ad Server." CC ¶64; *see also id.* ¶¶15, 72, 130. *See, e.g.*, *Collegenet*, 355 F. Supp. 3d at 955 (tying market power sufficient where product "so unique that competitors are unable to offer it") (quotation omitted); *Innovative Health LLC v. Biosense Webster, Inc.*, 2020 WL 8457483, at *9 (C.D. Cal. Dec. 11, 2020) (tying power shown where defendant "offers a product that is unique or that has special appeal to consumers"); *In re Webkinz Antitrust Litigation*, 2010 WL 4168845 (N.D. Cal. Oct. 20, 2010); *RxStrategies, Inc. v. CVS Pharmacy, Inc.*, 2019 WL 7584729 (M.D. Fla. Dec. 4, 2019).

Plaintiffs satisfy the requirement that the ties, either standing alone or in conjunction with other anticompetitive acts, have a significant negative impact on competition in the tied markets. As a result of the ties, Google has all but eliminated rival ad servers, CC ¶183, and Google uses its dominance in the Ad Server market to "impose anticompetitive rules . . . that artificially warp[] the channels through which publishers sell their ad inventory," in the Ad Intermediary markets. CC ¶9; *see also id.* ¶10. Google's control over rival Ad Intermediaries has contributed to the exit of multiple rivals from the Ad Exchange Market and otherwise substantially foreclosed competition. *Id.* ¶¶186-87; *see also id.* ¶¶179-91.

B. Google Used Its Gatekeeping Position to Undermine Competition—Not to Compete on the Merits

Through its ties and other exclusionary conduct, Google effectively entrenched itself as *the* central auctioneer that also participates in buying and selling at auction. CC ¶¶8-16, 124-34, 153-55; *see also id.* ¶160. This omniscient and conflicted position has enabled Google to exclude competition by imposing auction rules through its Ad Servers that disadvantaged rival Ad Intermediaries, and then repeatedly recalibrated the rules to impair rivals by punishing Advertisers for using rival Ad Intermediaries. *Id.* ¶¶8-16, 89-122.

Courts have time and again found that exploiting gatekeeping power to harm rivals—like Google has done here—constitutes exclusionary conduct. In *Arista*, 2018 WL 11230167, at *1,

Google's lawyer here argued to this Court that Cisco violated Section 2 through a so-called "open early, close late" scheme. Specifically, Arista asserted that Cisco had lured rivals into adopting Cisco's technology, only later to take steps to prevent Arista from using its technology. *Id.* at *10. Just like Google here, Cisco did not have an unqualified right to use its gatekeeping power to impair rivals. *Id.*; *see also Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 505-07 (9th Cir. 2010) (conduct exclusionary where firm improperly coerced oversight body to perpetuate the firm's role as the exclusive regulator of the .com domain name market, and then used that power to refuse domain name registry services on fair terms); *In re Lantus Direct Purchaser Antitrust Litig.*, 950 F.3d 1 (1st Cir. 2020) (conduct exclusionary where firm improperly gained monopoly power and then used it to impose anticompetitive royalty agreements on rivals).

Indeed, courts have repeatedly condemned dominant incumbents' use of such power to destroy competition—no matter how the gatekeeping position was achieved or maintained. For instance, in *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 785-86 (6th Cir. 2002), the defendant moist snuff manufacturer acted as a "category manager" for retail outlets, consulting on store displays and product placement. The court found that it had abused that gatekeeping power in violation of Section 2 by destroying its rival's store displays and otherwise undermining customer access to rival products. *See also Church & Dwight Co., Inc. v. Mayer Labs. Inc.*, 2011 WL 1225912, at *2, 14-15 (N.D. Cal. Apr. 1, 2011) (conduct exclusionary where monopolist condom seller used exclusive dealing and role as "category captain" at retail outlets to exclude rivals from customer displays).

Google here misused its illicitly entrenched gatekeeping power by rigging its auctions to punish Advertisers who dealt with rivals. More specifically, Google introduced "first-in-line" and "last look" privileges. CC ¶¶100-09, 112-15. The former allowed Google to determine whether its exchange could beat the highest estimated bid from Advertisers using rival Ad Intermediaries. CC ¶101; *see also id.* ¶¶89-99. If Google's exchange beat the estimate, Google declared itself the winner before any rivals could bid. *Id.* ¶101. Google's "last look" privilege allowed it to lowball initial bids, wait until advertisers using other Ad Intermediaries had responded, and then swoop in

and win by bidding only $0.01 more. *Id.* ¶¶104-05, 112-15.

Google further exploited its monopoly power and gatekeeping position to require Publishers to deal exclusively with Google relating to the *Publishers' own user and transactional data*. CC ¶¶153-54 (not "any data Google is alleged to collect," as Google asserts (Mot.16)). For instance, Google has coerced Publishers to implement Google's AMP format (CC ¶¶178, 154), which Google uses to capture and control Publishers' own user data. Google also forces Publishers to grant Google exclusive access to Publishers' data through its Ad Server, and then "degrade[s] the" publisher user "information available to others . . . , preserving complete information only for itself, by hashing", *i.e.*, encrypting, "user identifiers and providing different identifiers for the same user to the advertiser, on the one hand, and publishers on the other." CC ¶154. Google then systematically withholds user and transactional data from both Publishers and rival Ad Intermediaries, CC ¶153, degrading rivals' ability to make competitive bids. CC ¶¶153-54; CC ¶¶181-82, 185-88.

Publishers and Advertisers sought—and ultimately failed—to circumvent Google's rigged auctions by using "header bidding." *See id.* ¶¶110-16. Before Google undermined it, a Publisher could bypass the rules of Google's Ad Server and make its inventory available for simultaneous bidding, "leading to direct competition between bidders, leveling the playing field for rival Ad Exchanges[.]" *Id.* ¶110. Google defeated this competitive alternative by: (i) refusing to allow bids from its dominant Ad Exchange other than through its Ad Server, and then replicating Google's earlier version of "last look" by putting Google's bid in "only after the header bidding auction was complete, in effect nullifying the competition that header bidding provided," *id*. ¶112, (ii) strong-arming publishers into using its AMP format, *id.* ¶178, which was incompatible with header bidding, *id.* ¶114, and (iii) using its Ad Server to interfere with the coding that rival Ad Exchanges had used to facilitate header bidding. *Id.* ¶¶117-18.

Having undermined header bidding, CC ¶¶13, 110-18, thereby giving rival Ad Intermediaries no means of reaching Publishers other than through Google's rigged auctions, Google imposed a tax on its rivals' bids. *Id.* ¶¶119-22. And Google maximally structured that tax, not to generate revenue, but to impair its rivals from winning auctions. *Id.* Google asserts that it is

"entitled to charge for the use of its technology." Mot. 12-13. But Google misses the point. These taxes were not structured to "charge" for its services, but rather to cause rivals to lose auctions even with higher bids. Google used illicit ties to cement its gatekeeping power with respect to the Ad Intermediary markets and then misused that power with conduct not on the merits to harm rivals and customers.

C. Plaintiffs Do Not Allege Single-Market Refusals to Deal

Google argues that Plaintiffs have pled a series of single-market refusals to deal in which Google merely employed power emanating naturally from its own technological ingenuity to "favor [its] own products on [its] own platform." Mot. 2, 10-12. Google is wrong. That defense fails for five reasons. First, it assumes Google's gatekeeping power has always been maintained naturally rather than through coercion. Mot. 10 ("There is no allegation here . . . that advertisers or publishers are prevented from bypassing Google entirely[.]"). But that *is false*. Here, Plaintiffs allege that the ties and other exclusionary conduct—including conduct undermining header bidding—impaired rivals' ability to employ alternatives to Google's auctions. As shown above in Part II.B, having illicitly bolstered gatekeeping power, Google does not have an unqualified right to use that power to exclude or impair rivals.

Second, Google did not merely passively decline to "participate in header bidding," Mot. 12, or otherwise refuse to go out of its way to help rivals. Instead, and akin to the defendants in *Conwood* and *Church & Dwight*, Google aggressively used its gatekeeping power unlawfully entrenched in one market (Ad Server) to throw sand in the gears of rivals in others (Ad Intermediary). For instance, Google actively undermined header bidding by, *inter alia*, interfering with the coding necessary for that competitive alternative, and otherwise rigged auctions to impair rival Ad Intermediaries. *See* Part II.B. *Cf. Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072-73 (10th Cir. 2013)("Put simply if perhaps a little too simply, today a monopolist is much more likely to be held liable for failing to leave its rivals alone than for failing to come to their aid.").

Third, Google's conduct undermines rivals *by punishing rivals' customers*—conduct which courts have repeatedly condemned. *See, e.g.*, *Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53 (1951) (exclusionary for newspaper to try to destroy a radio station by refusing to sell

ad space to advertisers who ran ads on that station); *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 456-58 (1922) (condemning shoe machinery manufacturer that imposed financial penalties on customers for using its machines in combination with competitor's machinery); *Caldera, Inc. v. Microsoft Corp*., 87 F. Supp. 2d 1244, 1249-51 (D. Utah 1999) (Microsoft's practice of taxing customers for purchasing from rivals was exclusionary). *Cf. F.T.C. v. Facebook, Inc.*, No. CV 20-3590 (JEB), 2021 WL 2643627, at *20 (D.D.C. June 28, 2021) (conduct that "interferes with the relationship between rivals and third parties" is not a "standard refusal to deal" with a competitor). By punishing rivals' customers in this way, Google effectively raises the costs of rivals, which has long been deemed anticompetitive. *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 368 (7th Cir. 1987) (Easterbrook, J.) (by "rais[ing] its rivals' costs" the defendant "raised the market price to its own advantage," an anticompetitive strategy that violates antitrust's "principal purpose"—lowering prices).

The facts here are unlike those of the cases Google cites, Mot. 10-11, in which courts have refused to require entities with *lawfully maintained gatekeeping power* in a single market to *help rivals in that market*. So courts have declined to force a monopolist to rent retail space to a rival on its own resort (*Christy Sports LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188 (10th Cir. 2009)); or put a rival's products in its own vending machines (*Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300 (5th Cir. 1984)); or link to a rival's website (*Live Universe, Inc. v. MySpace, Inc.*, 304 F. Appx. 554 (9th Cir. 2008)). Those cases have no applicability here. Unlike in those cases, Google's gatekeeping power was cemented through illegal coercive ties. Notably, in *Christy Sports*, where the court found no duty to rent space to a rival, the court also recognized the conduct could well have been exclusionary if the defendant there had "first invite[d] an investment and then disallow[ed] the use of the investment." 555 F.3d at 1196. In other words, had the defendant maintained its gatekeeping power illicitly or through coercion and deceit, such as in, *e.g.*, *Arista*, it would *not* have been free to refuse to rent to its rival. Further, in Google's cases, the defendant was accused of not coming to the aid of a rival, whereas here, like in *Conwood* and *Church & Dwight*, Plaintiffs are alleging that Google has taken multiple affirmative steps to destroy competitive alternatives and disrupt rivals' customer relationships.

For similar reasons, *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009), Mot. at 10-13, is not on point. In *linkLine*, the defendant was alleged to have used lawfully maintained power in the wholesale market to charge its competitor in the retail market a high price, while charging customers in the retail market a low price. *Id*. at 442. The Court held that the defendant could charge what it wanted in the wholesale market because it had no duty to deal, and could charge low above-cost prices in the retail market. *Id*. at 457. Unlike here, the defendant in *linkLine* did not (a) engage in any exclusionary acts (it charged low, not high prices), (b) punish customers for dealing with rivals, or (c) entrench its gatekeeping power through coercion, deceit, or tying.

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398 (2004), Mot. 2, 10, 12, 16, does not help Google either. In *Trinko*, Verizon was accused of "alleged insufficient assistance in the provision of service to rivals," *Trinko*, 540 U.S. at 410, by failing to "interconnect" its phone network monopoly. Again, and unlike here, there was no suggestion that Verizon had acquired or maintained its gatekeeping power through anything other than its own ingenuity and investments, and there was no argument that the defendant had used tying or other conduct affirmatively to destroy competitive outlets (like, *e.g.*, Google's impairing of header bidding here). *Compare Trinko*, 540 U.S. at 410 (Verizon was being accused, not of affirmatively harming rivals, but instead of refusing to engage in "considerable expense and effort" by creating new systems that "must be designed and implemented simply to make [rival] access possible"). Further, *Trinko's* holding that a regulated monopoly, subject to express sharing obligations under a legislatively established regulatory regime, had no duty to deal because the presence of regulation effectively preempted a role for antitrust. *Id.* at 406, 409-11. That is not the case here. Google is not a regulated entity.

F.T.C. v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020), Mot. 13, does not provide Google with cover because there, unlike here, the defendant had done nothing unlawful to acquire or maintain the gatekeeping power it was accused of abusing. *Id.* at 996-97 (distinguishing case in which defendant had improperly maintained gatekeeping power and thus was prohibited from using that power to exclude). Additionally, in *Qualcomm*, the defendant charged the exact same

licensing fee whether customers purchased from it or a rival, and the conduct did not "impact competitors" at all. *Id*. at 1002. Here, Google's conduct is designed to punish customers that do not deal exclusively with Google (*cf. Caldera*, 87 F. Supp 2d at 1249 and *Qualcomm* at 969 F.3d at 1000) and interfere with rivals' customer relationships—bid through a rival ad exchange and the bid is subject to the tax and is otherwise less likely to succeed; bid through Google and there is no similar disadvantage. CC ¶¶117-22.

The recent decision in the F.T.C.'s litigation with Facebook has no applicability here either. *Facebook* explicitly distinguishes between the unilateral refusals to deal in that case and the kind of tying conduct at issue here, which the court noted would "involve[] some assay by the monopolist into the marketplace that interferes with the relationship between rivals and third parties." *F.T.C. v. Facebook, Inc.*, 2021 WL 2643627, at *20 (D.D.C. June 28, 2021) (internal quotations omitted). *Facebook* highlighted tying in particular because it "occurs when a firm 'requires third parties to purchase a bundle of goods rather than just the ones they really want,' thereby leveraging the monopolist's power in the 'tying' product market to harm its competitors (who lose access to customers) in the 'tied' product market." *Id.*

Fourth, Google did not exclude with conduct on the merits, *i.e.*, by making its products more attractive to customers; just the opposite. *See New York v. Actavis PLC*, 787 F.3d 638, 652 (2d Cir. 2015) (key is to "distinguish 'between conduct that defeats a competitor because of efficiency and consumer satisfaction'" versus conduct that impedes competition in other ways) (citation omitted); *Microsoft*, 253 F.3d at 62, 65 (condemning conduct that reduced rivals' sales "not by improving its own product" or by making its product "more attractive to consumers" but instead by imposing licensing terms preventing market participants from promoting rivals' products). Publishers prefer Ad Servers that "deal with multiple Ad Exchanges" to bring more and better bids, CC ¶10, and yet Google pursued policies that minimized competitive bidding and prioritized its "ability to capture commissions." *Id*. ¶205.

Contrary to Google's suggestion that Publishers benefit from Google's auction rigging, Mot. 11-12, Google designed its auctions to reduce incentives to maximize bids, "ensuring that Google wins even where the publisher could get a better price from another Ad Exchange[.]" CC

¶66; *see also id.* ¶105 (Google "depressed the bids and payments to publishers"); *id.* ¶207 ("auction bids would be higher . . . without Google's . . . manipulations"). Google's conduct also harmed Advertisers by enhancing Google's monopoly power, allowing Google to inflate its "take rate." CC ¶¶20, 204-06. In short, Google's conduct made its products *worse* for consumers. This case is therefore unlike *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group, LP*, 592 F.3d 991, 1002 (9th Cir. 2010), Mot. 10, where the defendant was accused of using lawfully maintained monopoly power to exclude by "introducing an improved product," and where, unlike here, there was no evidence that the defendant had used monopoly power to force the adoption of its technology. Here, Google degraded its services—and only succeeded in maintaining and enhancing gatekeeping power through coercion and exclusionary conduct.

Fifth, Publishers plead that as a condition of using Google's Ad Server, Publishers must exclusively provide critical user data to Google for as long as they use Google. CC ¶¶179-91, 200-08. This is exclusive dealing, not a refusal to deal. Courts have repeatedly condemned similar schemes by monopolists to exploit exclusive agreements with market participants to lock up a key input. *E.g.*, *Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154, 1167-68 (D. Nev. 2016) (distinguishing blocking rivals from accessing key input from a lawful refusal to deal); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 509 (E.D. Pa. 1972) (same). Google's citation to *Dreamstime.com, LLC v. Google, LLC*, No. 18-cv-01910, 2019 WL 341579, *7 (N.D. Cal. Jan. 28, 2019), Mot. 16, does not help its cause because there, unlike here, the plaintiff had not demonstrated that Google had obtained its data through any means other than its "natural advantages." 2019 WL 341579, at *8.

III. The Court Should Evaluate Google's Course of Conduct Collectively

Google invites the Court to err by treating each act as if it were part of a "completely separate and unrelated lawsuit[]." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962). Instead, while each act taken individually is sufficient (as discussed above), "the court should consider the defendant's various acts and examine them collectively for any 'synergistic result.'" *Tele Atlas N.V.*, 2008 WL 4809441, at *23, *quoting California Computer Products, Inc. v. International Business Machines, Corp.*, 613 F.2d 727, 746 (9th Cir. 1979). *See*

also, *e.g.*, *Continental Ore*, 370 U.S. at 699; *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1376, 1378 (9th Cir. 1992); *Simon and Simon, PC v. Align Technology, Inc*., 2021 WL 1309299, *5 (N.D. Cal. April 8, 2021).

Dismembering Google's course of conduct would be particularly inappropriate here given that Google's power in the markets at issue is mutually reinforcing, so the various strands necessarily have a synergistic effect. *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981) ("proper inquiry is whether . . . there is a 'synergistic effect'"). The Complaint describes a "vicious cycle" whereby "Google's publisher Ad Server stacked the deck in favor of Google's Ad Exchange." CC ¶11; *see also id.* ¶81. Moreover, it would be nonsensical to evaluate the tying that put Google in the role of gatekeeper separately from exclusionary conduct Google implemented as gatekeeper (*i.e.*, to evaluate at the "close late" as if it did not follow the "open early"). Google's only retort is to assert that combined treatment of the allegations would be improper because none of the alleged acts is an antitrust violation standing alone. Mot. 16. But Google's tying, rival-impairing rules, and other predatory conduct would be cognizable exclusionary acts by themselves.

And even if some portions of Google's course of conduct "could not stand alone," courts evaluate elements of such a scheme collectively provided the alleged anticompetitive activities each "tended 'to impair the opportunities of rivals' and 'did not further competition on the merits.'" *Free FreeHand*, 852 F. Supp. 2d at 1184 (quoting *PeaceHealth*, 515 F.3d at 894). *See also Forsyth v. Humana, Inc*., 114 F.3d 1467, 1478 (9th Cir. 1997) (Section 2 claim valid where plaintiff had evidence of a tie along with other conduct, which together impaired rivals), overruled on other grounds by *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012); *Tele Atlas N.V.*, 2008 WL 4911230, at *1 (tying claim could not stand alone, but survives as part of an exclusionary course of conduct; "'anticompetitive' conduct may include otherwise *legal* conduct") (emphasis in original); *Simon and Simon PC*, 2021 WL 1309299, at *9 (anticompetitive scheme may include legal conduct where there are synergies); *Le*, 216 F. Supp. 3d at 1168 (same). Google's cited cases on this point, Mot. 16, only address disjointed allegations devoid of standalone violations, and in any event, merely stand for the proposition that acts need to have

synergistic effects to qualify for collective consideration. *See City of Groton*, 662 F.2d at 935 (rejecting scheme claim because alleged acts could not harm competition); *Dreamstime.com*, 2019 WL 341579, at *7 (when viewed as a whole "no rival and no competition has been excluded"). The Complaint pleads synergies and reinforcing conduct.

IV. The California Unfair Competition Law Claims are Well Pled

Because Plaintiffs' antitrust claims survive for the reasons above, there is no basis to dismiss Plaintiffs' Unfair Competition Law ("UCL") claims. Independently, the California Supreme Court has held that the UCL reaches conduct that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws . . . or otherwise significantly threatens or harms competition." *Cel-Tech Comm., Inc. v. L.A. Cellular*, 20 Cal. 4th 163, 184-85 (1999); *Cent. Valley Med. Grp., Inc. v. Indep. Physician Assocs. Med. Grp., Inc.*, 2019 WL 3337891, at *4 (E.D. Cal. July 25, 2019) (*Cel-Tech* creates a "separate class" of claims for "'conduct that significantly threatens or harms competition' [. . .] an anti-trust violation is not a mandatory predicate for such claims.").

While some lower California courts have stated that contracts and combinations that pass scrutiny under a Section 1 Rule of Reason analysis are "not 'unfair,'" (*e.g.*, *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001)), Plaintiffs' antitrust claims arise under Section 2, which protects the market from monopolists and would-be monopolists. CC Counts I-II. Nor can Google's argument be reconciled with *Cel-Tech* or the well-reasoned cases that reject overbroad application of *Chavez*. *E.g.*, *Cent. Valley*, 2019 WL 3337891 at *4; *Creative Mobile Techs., LLC v. Flywheel Software, Inc.*, 2016 WL 5815311, at *5 (N.D. Cal. Oct. 5, 2016).

The line of cases that Google cites for the contrary position arose in *dicta* where an independent statute authorized the conduct at issue. *Cent. Valley*, 2019 WL 3337891 at *4; *see also San Jose v. Comm'r of Baseball*, 776 F.3d 686, 691-92 (9th Cir. 2015) (citing *Chavez* in *dicta* because a federal statute precluded state law on the issue). It was this line of distinguishable cases that Google presented in *Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1034 (N.D. Cal. 2015) (Freeman, J.) (concluding that plaintiffs lacked standing to assert the UCL; citing *Chavez* and *San Jose* as alternative grounds).

CONCLUSION

For the foregoing reasons, the Motion should be denied.

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Respectfully submitted,

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